No. 17-14394-JJ

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GULF COAST REBAR, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

IRON WORKERS REGIONAL DISTRICT COUNCIL

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

KIRA DELLINGER VOL
Supervisory Attorney

CRAIG R. EWASIUK
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-0656
(202) 840-7258

PETER B. ROBB
General Counsel
JOHN W. KYLE
Deputy General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GULF COAST REBAR, INC.	)	
	)	
Petitioner	)	
	)	No. 17-14394-JJ
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	12-CA-149627
	)	
Respondent	)	
	)	
And	)	
	)	
IRON WORKERS REGIONAL DISTRICT COUNCIL	)	
	)	
Intervenor	)	

AMENDED CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. R. 26.1 and Local Rules 26.1-1 and 26.1-4, the National Labor Relations Board ("the Board"), by its Deputy Associate General Counsel, hereby certifies that the following persons and entities have an interest in the outcome of this case:

1. Allen, James, Counsel for Petitioner
2. Dreeben, Linda, Deputy Associate General Counsel for the Board
3. Emanuel, William J., Board Member

4. Evans, Michael A., Counsel for International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers
5. Ewasiuk, Craig, Board Counsel
6. Gulf Coast Rebar, Inc., Petitioner
7. Hartnett Gladney Hetterman, LLC, Counsel for InternationalAssociation of Bridge, Structural, Ornamental and Reinforcing Iron Workers
8. Houston, Mary Ruth, Shutts & Bowen LLP, Counsel for Petitioner
9. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers
10. Iron Workers Regional District Council
11. Jason, Meredith, Deputy Assistant General Counsel for the Board
12. Kaplan, Marvin E., Board Member
13. **Krak, Kathleen M., Shutts & Bowen LLP, Counsel for Petitioner***
14. **Kyle, John W., Deputy General Counsel for the Board***
15. Leonard, Caroline, Counsel for Board General Counsel
16. Locke, Keltner W., Administrative Law Judge
17. McFerren, Lauren, Board Member
18. National Labor Relations Advocates LLC, Counsel for Petitioner
19. Pearce, Mark G., Board Member

20. Ring, John F., Board Chairman*

21. Robb, Peter B., General Counsel for the Board*

22. Scheck, Paul J., Shutts & Bowen LLP, Counsel for Petitioner

23. Shinners, Gary, Executive Secretary for the Board

24. Shutts & Bowen, LLP, Counsel for Petitioner

25. Vol, Kira Dellinger, Board Counsel

26. Zerby, Christopher, Counsel for Board General Counsel

Additions to the list of interested persons and entities are indicated in bold and with an asterisk. The following individuals, included on the original certification dated November 14, 2017, no longer have an interest in the outcome of this case.

1. Abruzzo, Jennifer A., former Acting General Counsel
2. Ferguson, John, former Associate General Counsel for the Board
3. Miscimarra, Philip A., former Board Chairman

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, D.C.
this 14th day of May, 2018

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Local Rule 28-1(c), the National Labor Relations Board agrees with the Petitioner that an oral argument may be of assistance to the Court in its review of this case.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Gulf Coast Rebar, Inc. ("Gulf Coast") for review, and the cross-application of the National Labor Relations

Board ("the Board") for enforcement, of a Board Decision and Order finding that Gulf Coast committed numerous unfair labor practices, including unlawfully refusing to bargain with the Iron Workers Regional District Council ("the Union"). The Order issued on September 18, 2017, and is reported at 365 NLRB No. 128. (D&O 1.)[1] The Union has intervened in this proceeding in support of the Board's application.

The Board had jurisdiction over the proceeding below under Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq*. ("the Act"). The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). The Board's Order is final, and venue is proper because Gulf Coast conducts business within the Eleventh Circuit. (D&O 12; GCX 1(bb) at 3, GCX 1(jj) at 2.) Gulf Coast's petition and the Board's cross-application were timely because the Act places no time limit on the initiation of review or enforcement proceedings.

[1] "D&O" references are to the Board's Decision and Order. "GCX" and "UX" refer, respectively, to the exhibits introduced by the General Counsel and the Union. "JS" references are to the parties' joint stipulation of fact. "Tr." references are to the hearing transcript. "Br." references are to Gulf Coast's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. Gulf Coast Rebar was originally named Gulf Coast Placers and so both names are used in the documents in this case to refer to the same entity. (D&O 18; Tr. 22-23.)

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of the uncontested portions of its Order finding that Gulf Coast committed numerous violations of Section 8(a)(1) and (3) of the Act.

2. Whether substantial evidence supports the Board's finding that Gulf Coast violated Section 8(a)(5) and (1) of the Act by failing to respond to an information request from, and thereby failing to bargain with, the Union. The dispositive underlying issue is whether substantial evidence supports the Board's finding that the Union's unfair-labor-practice charge was timely.

STATEMENT OF THE CASE

The Board seeks enforcement of its Order finding that Gulf Coast committed numerous unfair labor practices. Gulf Coast has admitted to all of the violations except one, namely, that it has unlawfully refused to provide the Union with requested information relevant to the Union's representational duties. Gulf Coast challenges the sole contested portion of the Order by arguing that the Union's unfair-labor-practice charge was untimely.

I. PROCEDURAL HISTORY

After investigating charges filed by the Union, the Board's General Counsel issued a complaint alleging that Gulf Coast had committed various violations of Section 8(a)(1) and (3) of the Act, 29 U.S.C. § 158(a)(1) and (3) by: 1) threatening

employees with closer than normal supervision and discharge because of their membership in, and activities on behalf of, the Union; 2) telling employees that it does not recognize the Union and that they could not inform other employees of the identity of the Union steward; 3) telling employees that they should not report grievances about their working conditions to the Union; 4) threatening to engage in physical altercations with employees, and threatening employees with discharge, because of their membership in, and activities on behalf of, the Union;

5) physically assaulting employees because of their membership in, and activities on behalf of, the Union; 6) falsely reporting to police, because of their membership in, and activities on behalf of, the Union, that employees had committed physical assault; 7) threatening employees with discharge unless they remove union stickers from their hardhats; 8) removing union stickers from employees' hardhats;

9) creating the impression that it engaged in surveillance of its employees' union or other protected concerted activities; 10) threatening employees with discharge and unspecified reprisals if they engage in activities on behalf of the Union;

11) isolating employees because of their membership in, or activities on behalf of, the Union, or to discourage other employees from engaging in such activities;

12) telling employees that it would not recognize the Union; 13) discharging an employee named Colby Lee; 14) isolating him from other employees after reinstating him; and 15) terminating his employment a second time after

threatening, physically assaulting, and filing a false police report against him because of his support for the Union or any other labor organization. (D&O 1 & n.2, 12-15; GCX 1(bb) at 5-6, 8.) In its answer, Gulf Coast admitted to all of those alleged violations. (D&O 1 & n.2, 12-15; GCX 1(jj) at 2-3.)

The complaint also alleged that Gulf Coast has failed and refused to furnish the Union with relevant, requested information in violation of Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). (D&O 12-14; GCX 1(bb) at 7-8.) Gulf Coast admitted that it had refused to provide the information but asserted, as an affirmative defense, that any charge based on that refusal was outside of the 6-month statutory limitation period specified in Section 10(b) of the Act, 29 U.S.C. § 160(b). Specifically, it argued that the Union had notice, outside of the limitations period, that Gulf Coast had repudiated its collective-bargaining agreement ("the Agreement") with the Union, and thus had repudiated any duty to recognize the Union as its employees' representative or provide information. (D&O 1, 12-14; GCX 1(jj) at 3.)

Following a hearing regarding Gulf Coast's Section 10(b) defense, the judge dismissed as untimely the allegations that Gulf Coast violated Section 8(a)(5) and (1) of the Act by failing to provide requested information and Section 8(a)(1) of the Act by telling employees that it did not recognize the Union. (D&O 23-25.) The judge found that Gulf Coast had committed the remaining, admitted violations.

(D&O 12-15.) On review, the Board reversed the judge's finding that Gulf Coast had proven its Section 10(b) defense and found that Gulf Coast had committed all of the alleged violations. (D&O 1 & n.2.)

II. THE BOARD'S FINDINGS OF FACT

Gulf Coast is a construction contractor specializing in the installation of rebar, or steel rods used to reinforce concrete, and has an office and place of business in Jacksonville, Florida. (D&O 1, 12; GCX 1(bb) at 3, GCX 1(jj) at 2, Tr. 77.) On March 13, 2009, Gulf Coast signed the Agreement with the Union. (D&O 1, 13, 16; GCX 2 at 13, JS 1, Tr. 77.) The Agreement was made pursuant to Section 8(f) of the Act, 29 U.S.C. § 158(f), which authorizes employers and unions in the construction industry to enter into such agreements without a prior showing that the union had achieved majority status, and even before any employees have been hired.[2] (D&O 1, 12, 15, 24; Tr. 11.)

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[2] Section 8(f) reads, in relevant part, as follows:

> It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged . . . in the building and construction industry and a labor organization of which building and construction industry employees are members . . . because (1) the majority status of such labor organizations has not been established under the provisions of section 9 of the Act prior to the making of such agreement . . . .

29 U.S.C. § 158(f).

The Agreement stated that it would remain in effect until February 10, 2012, and further specified that "unless written notice is given by either party to the other by certified or registered mail at least four (4) months prior to such date of a desire for change or termination, this Agreement shall continue in effect for an additional year thereafter." (D&O 1; GCX 2 at 12.) Moreover, the Agreement provided that it would "remain in effect from year to year thereafter, subject to termination at the expiration of any such contract year upon notice in writing given by either party to the other at least four (4) months prior to the expiration of such contract year." (D&O 1; GCX 2 at 12.) The Agreement required that Gulf Coast remit to the Union working assessments and dues for its employees, and make contributions to fringe-benefit trust funds. (D&O 3-4, 16-17 & n.3; GCX 2 at 8-11, Tr. 14, 38, 40.) It also contained an arbitration provision as part of the contractual grievance procedure. (D&O 2; GCX 2 at 5.)

Gulf Coast made the fund payments required by the Agreement through May 2009 and then stopped. (D&O 16-17; Tr. 64-65, 69.) The funds filed a suit against Gulf Coast in federal district court, and the parties reached a settlement on December 20, 2010, pursuant to which Gulf Coast agreed to make the fund payments due for June and July 2009, plus interest. (D&O 17; UX 4 at 2, Tr. 49-53.) Gulf Coast did not make fund payments after the settlement. (D&O 4, 17; Tr. 69.) On May 31, 2011, the Union and the funds filed another lawsuit in federal

district court seeking union dues and fund payments due since August 2009. (D&O 2, 18; JS 2, Tr. 14, 40.)

On October 18, 2011, Gulf Coast's attorney sent a letter to the Union. It asserted that Gulf Coast had sent an earlier letter terminating the Agreement and stated that "[w]e deny the legality of [the Agreement] and believe it to be void, nevertheless, this letter is to affirm that which my client has already done and to the extent a court deems it not to be void we immediately terminate it." (D&O 1, 18; GCX 3, Tr. 64.) The Union, which had not received an earlier termination letter, replied on February 10, 2012.[3] The Union's letter stated that Gulf Coast's October 18 letter was "ineffective to terminate" the Agreement because it did not comply with the contractual termination requirements. The Union also stated that it still considered the Agreement to be in effect, and requested that Gulf Coast forward any information showing that it had previously attempted to terminate the Agreement. Gulf Coast did not reply to the Union's February 10 letter. (D&O 2, 18; GCX 4, Tr. 31-32.)

[3] Gulf Coast states (Br. 2-4) that it had sent earlier letters, but the Board found, based on documentary evidence and credibility determinations, that the Union never received such letters. (D&O 17-18.) Gulf Coast has not challenged those credibility findings. *See NLRB v. Allied Med. Transp., Inc.*, 805 F.3d 1000, 1005 (11th Cir. 2015) ("'[C]ourts are bound by the credibility choices of the [administrative law judge]' unless they are 'inherently unreasonable,' 'self-contradictory,' or 'based on an inadequate reason.'") (citing *NLRB v. Goya Foods of Fla.*, 525 F.3d 1117, 1126 (11th Cir. 2008)) (alteration in original).

Six weeks later, on April 3, 2012, Gulf Coast successfully moved the district court to compel arbitration of the Union's claims by invoking the Agreement's grievance procedure. (D&O 2 & n.3; GCX 6(c) at 9, JS 3.) On January 7, 2014, at the arbitration hearing, Gulf Coast argued that the Agreement was void because it was obtained through fraud, duress, or misrepresentation. (D&O 2 & n.5, 19, 22-23; GCX 6(c) at 8, UX 6 at 111.) The arbitrator found that argument to be "without merit," and concluded that Gulf Coast's "request of the court to order arbitration . . . is essentially a validation of the [Agreement]." (D&O 19; GCX 6(c) at 10.) Gulf Coast did not argue in arbitration that it had repudiated the Agreement after entering into it. (D&O 2 n.5; GCX 6(c) at 10, Br. 6.) The arbitrator issued an award in favor of the Union on April 9, 2014, and directed Gulf Coast "to submit to an audit to determine all dues and assessments owed from the period of August 2009 to the present." (D&O 2; GCX 6(c) at 11, JS 5, Tr. 43.) The district court confirmed and enforced the award on January 26, 2015. (D&O 2; GCX 6(a), JS 7, Tr. 15.)

On March 23, 2015, the Union requested information from Gulf Coast regarding all of its employees and projects from January 1, 2011, through the present. (D&O 1; GCX 5, Tr. 33-34.) Gulf Coast admits that it did not respond to the information request and does not contest the necessity and relevance of the information sought. (D&O 1, 14, 16; GCX 1(bb) at 7-8, GCX 1(jj) at 3.)

III. THE BOARD'S CONCLUSION AND ORDER

On the foregoing facts, the Board (Chairman Miscimarra; Members Pearce and McFerran) affirmed, in the absence of exceptions, the judge's finding that Gulf Coast committed numerous violations of Section 8(a)(1) and (3) of the Act, including unlawfully discharging employee Lee. (D&O 1.) The Board (Members Pearce and McFerran; Chairman Miscimarra, dissenting) also found that Gulf Coast violated Section 8(a)(5) and (1) by refusing to respond to the Union's information request, and Section 8(a)(1) by telling employees that it did not recognize the Union, reversing the judge's finding that Section 10(b) barred the underlying charges. (D&O 1 & n.2.)

The Board's Order requires Gulf Coast to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. (D&O 4-5.) Affirmatively, the Order requires Gulf Coast to offer reinstatement to Lee, make him whole for lost earnings or benefits, expunge any record of the unlawful discharge from his personnel file, and notify Lee of that action and that the unlawful discipline will not be used against him in any way. (D&O 5.) The Order also requires Gulf Coast to furnish the Union with the requested information and to post a remedial notice. (D&O 5.)

STANDARD OF REVIEW

This Court affords "considerable deference to the Board's expertise in applying the . . . Act to the labor controversies that come before it." *Visiting Nurse Health Sys., Inc. v. NLRB*, 108 F.3d 1358, 1360 (11th Cir. 1997). The Court will sustain the Board's factual findings if "supported by "substantial evidence on the record considered as a whole." *Evans Servs., Inc. v. NLRB*, 810 F.2d 1089, 1092 (11th Cir. 1987) (quoting 29 U.S.C. § 160(e)); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-91 (1951). The Board's reasonable inferences from the evidence will not be displaced even if the Court might have reached a different conclusion had the matter been before it *de novo*. *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1428-29 (11th Cir. 1985). The same standard applies when the Board reaches a different conclusion than its judge. *See NLRB v. Gimrock Const., Inc.*, 247 F.3d 1307, 1311 (11th Cir. 2001) (to "differ with the [judge] on inferences and conclusions to be drawn from the facts is the Board's prerogative") (citing *Nix v. NLRB*, 418 F.2d 1001, 1008 (5th Cir. 1969)). Finally, the Court will "defer to the Board's conclusions of law if they are based on a reasonable construction of the Act." *Evans Servs., Inc.*, 810 F.2d at 1092.

SUMMARY OF ARGUMENT

Because Gulf Coast does not contest the Board's finding that it committed numerous serious violations of Section 8(a)(1) and (3) of the Act, the Board is entitled to summary enforcement of the portion of its Order remedying those violations.

With respect to the sole contested violation before the Court, substantial evidence supports the Board's finding that Gulf Coast's admitted refusal to respond to the Union's information request violated Section 8(a)(5) and (1) of the Act. Gulf Coast failed to show that it had given clear and unequivocal notice that it had repudiated the Agreement outside of the Section 10(b) limitations period, even assuming that such an unlawful repudiation would render the Union's charge untimely. Specifically, Gulf Coast has failed to show that its October 2011 letter, viewed in light of its subsequent motion for arbitration, gave the Union clear and unequivocal notice of contract repudiation for 6 months before the Union's charge. And Gulf Coast's statements in arbitration and failure to remit payments to the Union and funds also failed to give such clear and unequivocal notice.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE PORTIONS OF ITS ORDER REMEDYING NUMEROUS UNCONTESTED VIOLATIONS OF SECTION 8(a)(1) AND (3) OF THE ACT

In its opening brief, Gulf Coast does not dispute the Board's finding—and indeed admitted in its answer to the General Counsel's complaint—that it committed numerous violations of Section 8(a)(1) of the Act,[4] by:

- threatening employees with closer than normal supervision and discharge because of their membership in, and activities on behalf of, the Union;
- telling employees that it does not recognize the Union and that they could not inform other employees of the identity of the Union steward;
- telling employees that they should not report grievances about their working conditions to the Union;
- threatening to engage in physical altercations with employees, and threatening employees with discharge, because of their membership in, and activities on behalf of, the Union;
- physically assaulting employees because of their membership in, and activities on behalf of, the Union;
- falsely reporting to police, because of their membership in, and activities on behalf of, the Union, that employees had committed physical assault;

[4] Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(a)(1). Section 7 of the Act states that employees "have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157.

- threatening employees with discharge unless they removed union stickers from their hardhats;
- removing union stickers from employees' hardhats;
- creating the impression that it engaged in surveillance of its employees' union or other protected concerted activities;
- threatening employees with discharge and unspecified reprisals if they engaged in activities on behalf of the Union;
- isolating employees because of their membership in, or activities on behalf of, the Union, or to discourage other employees from engaging in such activities; and
- telling employees that it would not recognize the Union.[5]

Gulf Coast also does not dispute—and admitted in its answer—that it violated Section 8(a)(3) and (1) of the Act by taking several adverse actions against employee Lee because of his union activities,[6] specifically:

- discharging Lee;

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[5] The Board found this uncontested violation after determining, contrary to the judge, that Gulf Coast had not clearly repudiated the Agreement outside of the Section 10(b) period. *See* pp.4, 5-6, 10, *supra*.

[6] Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." 29 U.S.C. § 158(a)(3). A violation of Section 8(a)(3) is a derivative violation of Section 8(a)(1). *See, e.g.*, *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

- isolating him from other employees after reinstating him; and
- terminating his employment a second time after threatening, physically assaulting, and filing a false police report against him.

(D&O 1 & n.2, 12-15; GCX 1(bb) at 5-6 & 8, GCX 1(jj) at 2-3.)

Because Gulf Coast does not dispute in its brief that it committed the unfair labor practices described above, it has waived any challenge to them. *See United States v. Nealy*, 232 F.3d 825, 830-31 (11th Cir. 2000) (arguments not raised in opening brief are waived); *see also* Fed. R. App. P. 28(a)(8)(A) (brief must contain party's contentions with citation to authorities and record); *accord Herring v. Sec'y, Dept. of Corr.*, 397 F.3d 1338, 1342 (11th Cir. 2005) (arguments "raised for the first time in a reply brief are not properly before a reviewing court"). Moreover, this Court would be jurisdictionally barred from considering any such challenges because they were not first presented to the Board. 29 U.S.C. § 160(e); *accord Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (Section 10(e) precludes courts of appeals from reviewing claims not raised before the Board); *NLRB v. Goya Foods of Fla.*, 525 F.3d 1117, 1122 n.2 (11th Cir. 2008) (same). The Board is therefore entitled to summary enforcement of the portion of its Order remedying the uncontested violations. *NLRB v. Dynatron/Bondo Corp.*, 176 F.3d 1310, 1313 n.2 (11th Cir. 1999); *Purolator Armored*, 764 F.2d at 1427-28.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT GULF COAST VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY FAILING TO RESPOND TO THE UNION'S INFORMATION REQUEST

A. Gulf Coast Admits that It Refused To Provide Relevant, Requested Information to the Union

Under Section 8(a)(5) of the Act, it is an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of [its] employees." 29 U.S.C. § 158(a)(5). That statutory duty to bargain applies when a union represents the employer's employees pursuant to a Section 8(f) agreement. *See Elec. Workers Local 58 Pension Tr. Fund v. Gary's Elec. Serv. Co.*, 227 F.3d 646, 653-54 (6th Cir. 2000); *Oliver Insulating Co.*, 309 NLRB 725, 726 (1992), *enforced*, 995 F.2d 1067 (6th Cir. 1993). And it includes the duty "to provide information that is needed by the bargaining representative for the proper performance of its duties." *NLRB v. U.S. Postal Serv.*, 888 F.2d 1568, 1570 (11th Cir. 1989) (quoting *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967)). Accordingly, an employer's failure to provide such relevant information to a union representing its employees, upon request, constitutes a violation of Section 8(a)(5) and (1) of the Act.[7] *Acme Indus. Co.*, 385 U.S. at 435-37; *accord NLRB v. Laredo Coca Cola Bottling Co.*, 613 F.2d 1338, 1343 (5th Cir. 1980).

[7] As in the case of a Section 8(a)(3) violation, a violation of Section 8(a)(5) results in a derivative violation of Section 8(a)(1). *See, e.g., NLRB v. Amoco Chems. Corp.*, 529 F.2d 427, 429 (5th Cir. 1976). Fifth Circuit decisions rendered prior

Here, Gulf Coast has admitted to the relevance of the requested information and to its refusal to respond to the request. (D&O 1, 14, 16; GCX 1(bb) at 5-6 & 8, GCX 1(jj) at 3.) However, it argues that its refusal to bargain is not unlawful absent an ongoing, Section 8(f) collective-bargaining relationship with the Union. Gulf Coast has also admitted that it did not lawfully terminate the Agreement according to its terms. (D&O 1, 17, 20; Tr. 29-30.) But it contends, as an affirmative defense, that any bargaining relationship—and concomitant duty to provide information—ended when it purportedly *unlawfully* repudiated the Agreement mid-term, outside of the 6-month statutory limitations period for the Union's unfair-labor-practice charge. (Br. 23-24, 26-27.) The Board assumed without deciding (D&O 1) that such a time-barred, unlawful repudiation would establish a defense to Gulf Coast's otherwise unlawful failure to bargain, but rejected the defense on the facts of this case.[8]

October 1, 1981, are precedent in the Eleventh Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

[8] This Court has not applied the Board's rule against mid-term repudiation of Section 8(f) agreements, *see John Deklewa & Sons*, 282 NLRB 1375 (1987), *enforced sub nom. Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), deferring instead to earlier in-circuit precedent finding such repudiations lawful, *see Local Union 48 Sheet Metal Workers v. S.L. Pappas & Co.*, 106 F.3d 970, 975 (11th Cir. 1997) (citing *Plumbers & Pipefitters Local Union 72 v. John Payne Co., Inc.*, 850 F.2d 1535, 1540 (11th Cir. 1988)). That legal disagreement is not material here, however, because the Board's decision is based *not* on a finding that Gulf Coast unlawfully repudiated the Agreement mid-term, but on a finding that Gulf Coast did not clearly and unequivocally repudiate the Agreement at all. In

B. Gulf Coast Failed To Meet Its Burden To Prove that the Complaint Was Untimely

Section 10(b) of the Act states that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. § 160(b); *see U.S. Mosaic Tile Co. v. NLRB*, 935 F.2d 1249, 1259 (11th Cir. 1991); *accord Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411, 419 (1960). The party raising Section 10(b) as a defense has the burden of proving that the complaint is time-barred. *Chinese Am. Planning Council, Inc.*, 307 NLRB 410, 410 (1992), *enforced*, 990 F.2d 624 (2d Cir. 1993) (unpublished table decision). Substantial evidence supports the Board's finding that Gulf Coast did not meet its burden to make out that affirmative defense.

1. A purported repudiation, if subsequently contradicted by a conflicting signal, does not provide the requisite clear and unequivocal notice to establish a time bar

The Section 10(b) limitations period begins "only when a party has clear and unequivocal notice of a violation of the Act." *A & L Underground*, 302 NLRB

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any case, Gulf Coast has not challenged the Board's *Deklewa* rule either before the Board or in its opening brief to this Court; to the contrary, it concedes that its purported repudiation was unlawful. (Br. 23.) Hence, this Court does not have jurisdiction to consider the validity of that rule, 29 U.S.C. § 160(e), and Gulf Coast has waived any challenge to the rule, Fed. R. App. P. 28(a)(8)(A). *See U.S. Mosaic Tile Co. v. NLRB*, 935 F.2d 1249, 1257 (11th Cir. 1991) (refusing to address employer's defense based on *Deklewa* when not timely asserted).

467, 469 (1991); *accord Pub. Serv. Elec. & Gas Co.*, 323 NLRB 1182, 1188 (1997), *enforced*, 157 F.3d 222 (3d. Cir. 1998); *see also Logan County Airport Contractors*, 305 NLRB 854, 859 (1991) (notice of contract repudiation must be "unmistakable"). But the time bar does not apply when a delay in filing "is a consequence of conflicting signals" by the charged party. *A & L Underground*, 302 NLRB at 469. Such signals may be subsequent to the putative notice of an unfair labor practice, if they are within the 6-month limitation period. *See Ohio & Vicinity Reg'l Council of Carpenters (the Schaefer Grp., Inc.)*, 344 NLRB 366, 368 (2005) (complaint against union for refusing to enforce employee's arbitration award time-barred because union's renewed effort to enforce the award—a conflicting signal—occurred *more* than 6 months after the employee was on notice that the union would not seek enforcement, and union "took no action inconsistent with this refusal" during the Section 10(b) period). That principle holds true in cases like this one, involving repudiation violations. *See, e.g.*, *Dixon Commercial Elec. Inc.*, 302 NLRB 946, 947-48 (1991) ("The record is devoid of any evidence that the [employer], subsequent to its . . . repudiation letter, reentered into a bargaining relationship of any kind with the Union."); *Natico, Inc.*, 302 NLRB 668, 671 (1991) (considering whether employer's conduct after initially repudiating a contract provision "was inconsistent with its repudiation of its obligation so as to push the occurrence of either actual repudiation or notice to the

Union into the Section 10(b) period"); *Diamond Coal Min. Co.*, 298 NLRB 775, 776 (1990) (considering whether the employer engaged in any conduct "that can be construed as inconsistent with [its] initial" repudiation in determining whether the union's claim was time-barred); *Chemung Contracting Corp.*, 291 NLRB 773, 774 (1988) (same).

2. In light of its motion to compel arbitration under the Agreement, Gulf Coast's October 2011 letter did not give clear and unequivocal notice of contract repudiation

On October 18, 2011, Gulf Coast sent a letter to the Union stating that it "den[ied] the legality of [the Agreement] and believe[d] it to be void . . . ." (D&O 1; GCX 3, Tr. 64.) The Board reasonably found that "[e]ven assuming, without deciding, that the letter could have constituted clear and unequivocal notice to the Union of repudiation, . . . [Gulf Coast] acted inconsistently with any such repudiation within th[e] 6-month [Section 10(b)] period." (D&O 2.) Specifically, on April 3, 2012, less than 6 months after it sent that letter, Gulf Coast moved the district court, where it was being sued by the Union and funds for missed dues and payments, to compel arbitration of the Union's claims under the Agreement's arbitration provision. (D&O 2 & n.3; GCX 6(c) at 9, JS 3.) In moving for arbitration, Gulf Coast sought to avail itself of a benefit stemming from the Agreement, sending a conflicting signal that obscured any repudiation message in its earlier letter. As the Board found, "[t]he Union's decision [not to file a charge]

necessarily would be informed by [that] conflicting signal." (D&O 3.) Hence, Gulf Coast could not make out its defense that the Union had clear and unequivocal notice of any repudiation outside of the Section 10(b) period.

That rationale is consistent with previous cases in which the Board has held that a party's participation in contractual arbitration may be a conflicting signal that can prevent an earlier representation from qualifying as a clear and unequivocal contract repudiation for the purposes of a Section 10(b) defense. In *Farmingdale Iron Works, Inc.*, 249 NLRB 98, 98, 105 (1980), *enforced mem.*, 661 F.2d 910 (2d Cir. 1981), for example, the Board rejected the employer's argument that its refusal to sign the conformed version of its collective-bargaining agreement, and statement that it would stop payments under the contract, gave clear and unequivocal notice of repudiation. In doing so, the Board cited the employer's later participation in contractual arbitration and provision of records to the union. *Id.* Here, Gulf Coast not only agreed to participate in contractual arbitration under the very Agreement it claims it had repudiated, but initiated that arbitration by filing a motion to compel in district court. Gulf Coast thereby sent a conflicting signal to the Union within 6 months of its October 2011 letter, rendering unclear the basis for an unfair-labor-practice charge before the Union's time to file such a charge had expired.

Moreover, contrary to Gulf Coast's argument (Br. 18-20), its legal position in the arbitration did not constitute a repudiation and, if anything, buttresses the Board's finding that the Union did not have clear and unequivocal notice outside of the Section 10(b) period. At the arbitration hearing on January 7, 2014, Gulf Coast argued that it had entered into the Agreement under duress, making it void *ab initio*. (D&O 2 & n.5, 19, 22-23; GCX 6(c) at 8, UX 6 at 111.) The Board reasonably found that such accusations did not put the Union on notice that Gulf Coast was unlawfully repudiating the Agreement at that time, "in advance of and regardless of the outcome of the contractual arbitration process." (D&O 2 n.5.) *See Esmark, Inc. v. NLRB*, 887 F.2d 739, 746 (7th Cir. 1989) (for a repudiation to give clear and unequivocal notice, repudiating party's "decision must be final, and not subject to further change").

As the Board explained, Gulf Coast's argument in arbitration "strongly implied that [Gulf Coast] would not persist in denying the [Agreement's] legality in the event of an adverse legal ruling on that issue." (D&O 2 n.5.) *See Logan County Airport Contractors*, 305 NLRB at 860-61 (employer's communications suggesting that it was awaiting judicial approval to rescind its collective-bargaining agreement did not provide sufficient notice of repudiation to the union). Notably, at no time during the arbitration proceeding did Gulf Coast expressly argue that it had previously repudiated, or was presently repudiating, the

Agreement. (D&O 2 n.5; GCX 6(c) at 8-9, Br. 6.) Nor did Gulf Coast argue that, in the event the arbitrator found the Agreement to be a valid contract (which he ultimately did), it was only liable for payments to the Union and related funds up to a specific repudiation date.[9] *Cf. Farmingdale Iron Works*, 249 NLRB at 103, 105-06 (employer's statement at a second arbitration hearing, that it "did not recognize that it had a collective-bargaining agreement with the [u]nion" and would not provide records subpoenaed by the union for arbitration covering the time when the employer insisted that the contract was no longer in effect, found to be a clear and unequivocal repudiation). Because Gulf Coast's purported repudiation at arbitration was a legal challenge to the validity of the Agreement—and not an express refusal to abide by the Agreement even if it were determined to be lawful—it was neither unambiguous nor final.

Gulf Coast argues (Br. 27-28) that the October 2011 letter must be analyzed in isolation, disregarding any subsequent conduct, because the Section 10(b) period begins to run when a charging party *first* has knowledge of facts "necessary to support a ripe unfair labor practice." *St. Barnabas Med. Ctr.*, 343 NLRB 1125, 1127 (2004). However, the Board reasonably rejected the proposition that Board

[9] Accordingly, the arbitrator ordered Gulf Coast to submit to an audit to determine all dues and assessments owed from August 2009, the day that the Union claimed Gulf Coast stopped making payments, to April 9, 2014, the day that the arbitrator rendered his decision. *See* p.9, *supra*.

law precludes, or policy counsels against, considering Gulf Coast's subsequent conflicting signal in determining whether the Union ultimately had clear and unequivocal notice of repudiation. (D&O 2-3 & n.6.)

As the Board noted (D&O 2), under *A & L Underground*, a party cannot rely on Section 10(b) to make out a timeliness defense where the "delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct by the other party." 302 NLRB at 469. Gulf Coast takes that quote out of context to support the proposition that "once a party does receive clear and unambiguous notice of contract repudiation, any delay in filing an unfair labor practice charge *is not* 'a consequence of conflicting signals or otherwise ambiguous conduct.'" (Br. 28 (emphasis added).) As noted (p.18-19), the Board in *A & L Underground* held that the Section 10(b) period begins to run once a party receives clear notice of a violation. 302 NLRB at 469. But it used the contested quote regarding "conflicting signals" to qualify that holding by defining who is "not barred by [Section 10(b) under its] holding," namely, charging parties adversely affected by such signals by the party asserting a timeliness defense. *Id*.

Indeed, in *A & L Underground*, unlike here, there was no dispute regarding the timing of the contract repudiation. There, the parties stipulated that the employer had given clear and unequivocal notice of contract repudiation more than eight months before the union filed charges. *Id.* at 467. The sole issue was

whether the General Counsel could still issue a complaint based on a "continuing violation" theory, i.e., that each subsequent refusal to abide by the agreement during the contractual term was an independent unfair labor practice. *Id.* & n.4.[10] In rejecting the application of that theory to violations based on total contract repudiation, the Board found that, after repudiation, "subsequent conduct in conformity with [the repudiation]," e.g., the employer's continuing noncompliance, was not an independent unfair labor practice. *Id.* at 469 n.9. But the Board in *A & L Underground* did not foreclose consideration of subsequent conduct *not* consistent with a repudiation—in the case of Gulf Coast, the evocation of and reliance on the arbitration provision of the Agreement—in evaluating a party's Section 10(b) defense. *See* pp.19-20, *supra*.

Nor does Gulf Coast's reliance (Br. 27-28) on *Vallow Floor Coverings, Inc.*, 335 NLRB 20 (2001), and *St. Barnabas Medical Center*, 343 NLRB 1125, undermine this analysis. The language Gulf Coast highlights (Br. 27) from *Vallow Floor Coverings* merely restates the same principle regarding continuing violations. There, the Board found that the union never had clear and unequivocal notice of the employer's repudiation of the entire collective-bargaining agreement outside of the Section 10(b) period, and thus had no occasion to discuss whether,

[10] Contrary to Gulf Coast's assertion (Br. 30-31), the Board did not rely on a "continuing violation" theory to reject Gulf Coast's Section 10(b) argument. (D&O 2-3.)

hypothetically, a repudiation would have remained clear and unequivocal in light of subsequent conflicting signals. 335 NLRB at 21. In *St. Barnabas Medical Center*, it was "undisputed that the union was acutely aware, long before 6 months prior to the filing of the charge," that the employer was refusing to apply the parties' collective-bargaining agreement to a class of employees that the union believed should have been included in the bargaining unit. 343 NLRB at 1127. Nonetheless, in disagreeing with the judge's finding that the Section 10(b) period did not start until the employer rejected the union's last demand to represent the disputed employees, the Board there relied in part on the fact that the employer had not made "any representations" indicating that it might change the position it clearly had held for at least seventeen months. *Id.*

Finally, the Board rejected Gulf Coast's policy arguments (Br. 10, 30) that the decision in this case either defeats the purposes of Section 10(b) or disfavors arbitration. (D&O 3 & n.6.) First, as the Board observed, the protection afforded by *A & L Underground* to parties who delay filing charges because of conflicting signals by the other party "necessarily encompasses the entire 6-month 10(b) period . . . [and] not merely the putative moment of repudiation." (D&O 3; *see also* pp.19-20, *supra*.) Hence, a charging party has never been expected "to immediately decide whether to file a charge," contrary to its statutory right to a full 6 months. (D&O 3.) And nothing in the Board's Order changes those baseline

Section 10(b) principles or will create confusion or delay in filing charges. As the Board explained, a charging party has never been expected to "ignore all subsequent ambiguous conduct in which the repudiating party engages"—whether it files charges soon after the repudiation or waits the full 6 months—and a repudiating party has never been able to benefit from uncertainty of its own making during the Section 10(b) period in order to circumvent an unfair-labor-practice charge. (D&O 3.) *See Esmark, Inc.*, 887 F.2d at 746 ("While the victims of an unfair labor practice should be encouraged to file a charge with the NLRB as soon as possible, individuals should not be forced to file anticipatory or premature charges, challenging tentative or merely hypothetical decisions, in order to protect their statutory rights.").

Second, Gulf Coast overreads the Board's order with respect to arbitration. Here, Gulf Coast made no effort to preserve the clarity of its purported repudiation message when it chose to invoke the Agreement's arbitration provision, so the Board had no occasion to consider the effect of any such effort. Nothing in the Board's Order suggests that a party could not preserve an otherwise clear and unequivocal message of repudiation while invoking arbitration if it took steps to make clear that by doing so it had not and would not alter its position respecting repudiation. *See, e.g.*, *Farmingdale Iron Works*, 249 NLRB at 103, 105-06 (finding that participation in arbitration undermined employer's first purported

repudiation, but that a subsequent "blunt[] and unequivocal[]" repudiation made during arbitration was preserved despite employer's continued participation in the proceedings).

In sum, the Union cannot be penalized under Board law for not filing charges alleging contract repudiation at a time when Gulf Coast was invoking the Agreement to compel arbitration, and then awaiting the decision of the arbitrator and a court to determine whether the Agreement was still in effect. Because any repudiation message that the October 2011 letter may have conveyed was clouded by Gulf Coast's subsequent motion to compel arbitration and position in arbitration, the Union did not have clear and unequivocal notice for a full 6 months before filing the charge in this case.

3. Gulf Coast's failure to make union and fund payments did not give clear and unequivocal notice that it had repudiated the Agreement

Gulf Coast asserts (Br. 15-16, 21-23, 27) that its repeated failure to make contractually mandated payments to the Union and the funds constituted constructive notice of repudiation. The Board reasonably found that Gulf Coast's failure to make those payments may have signaled repudiation of the specific contractual provisions mandating them, but did not give clear and unequivocal notice that Gulf Coast had repudiated the entire Agreement. (D&O 3-4.)

It is well-settled law that an employer's failure to comply with some contract provisions is insufficient to provide clear and unequivocal notice of complete contract repudiation. *See Logan County Airport Contractors*, 305 NLRB at 859 (contract repudiation and "its communication must be total, rather than 'an accumulation of breaches'") (citing *A & L Underground*, 302 NLRB at 468); *Adobe Walls, Inc.*, 305 NLRB 25, 25 n.1 (1991) (rejecting employer's argument that by ceasing to make fringe-benefit-fund payments it had totally repudiated its contract with the union); *Park Inn Homes for Adults*, 293 NLRB 1082, 1082-83 (1989) (employer's refusal to make fund contributions only put union on notice that it had repudiated that particular contractual obligation two years before it attempted to terminate entire contract); *Farmingdale Iron Works*, 249 NLRB at 98-99 (employer's failure to make fund contributions put union on notice that employer had repudiated that particular contractual obligation, but not that it had repudiated the collective-bargaining agreement altogether). By contrast, an employer's refusal to apply *any* part of a contract at all can provide clear and unequivocal notice of complete contract repudiation. *See St. Barnabas Med. Ctr.*, 343 NLRB at 1128 (employer repudiated contract by categorically refusing to apply it to a class of registered nurses it believed should be excluded from unit, and

"never strayed from its assertion that it did not have to apply the contract to the disputed RNs").[11]

Here, after signing the Agreement and initially complying, Gulf Coast stopped making contractually required payments to the Union and funds. (D&O 3-4; Tr. 64-65, 69.) It then settled a lawsuit, paying the fund contributions owed through July 2009. (D&O 17; UX 4 at 2, Tr. 49-53.) After Gulf Coast yet again failed to make required payments, the Union and funds filed another lawsuit in federal district court in May 2011, and Gulf Coast moved for arbitration under the Agreement. (D&O 2 & n.3, 19; JS 2 & 3, Tr. 14, 40.)

The Board reasonably found that the failure to make those payments "at most, provided the Union with notice of . . .[Gulf Coast's] intent to repudiate th[e] contract provisions" requiring those payments. (D&O 3.) As in *Park Inn Home for Adults* and like cases, where the employer had only stopped complying with particular contract provisions, Gulf Coast's failure to make payments to the Union and funds was insufficient to provide clear and unequivocal notice of complete contract repudiation. And unlike in *St. Barnabas Medical Center*, where the employer consistently "refus[ed] to apply *any* part of the contract to *any* of the

[11] Gulf Coast suggests (Br. 21) that *Natico Inc.*, 302 NLRB 668, stands for the proposition that an employer's failure to make pension contributions for a long period of time provides notice of total contract repudiation. However, as discussed (pp.19-20), *Natico* only addresses whether an employer can repudiate specific contractual provisions through noncompliance with those provisions.

disputed RNs at *any* time since the [it] entered into a collective-bargaining relationship with the Union" 6 years earlier, 343 NLRB at 1130, it has not been Gulf Coast's steadfast position that its employees were not covered by the Agreement. Rather, Gulf Coast created confusion by agreeing to be bound by the Agreement, making contractually required payments at first, then failing to make them, making more payments pursuant to a settlement, and then compelling arbitration under the Agreement to determine its liability for the rest. Moreover, as the Board found (D&O 3), even if the missed fund payments had sent a clear message repudiating the benefit provisions of the contract, Gulf Coast's motion to compel arbitration was a conflicting signal that obscured any message of full contract repudiation. *See* pp.20-21, *supra*.

Gulf Coast also argues (Br. 15-16, 21), citing *Masco Contractor Services East, Inc.*, 346 NLRB 400 (2006), that Union President Steve Parker's testimony that Gulf Coast stopped complying with the Agreement in 2009 and had not fulfilled any of obligations under the Agreement after December 2010 is dispositive proof that the Union had notice of repudiation. However, in *Masco*, a union representative's admission that he knew that the employer was noncompliant did not foreclose the Board from considering other evidence to determine whether, in fact, "the Union was aware that [the employer] . . . was not adhering to any collective-bargaining agreement" outside of the Section 10(b) period. 346 NLRB

at 402. There, the Board noted that "other evidence support[ed the union representative's] admissions" that left no doubt as to the meaning of his statements. *Id.* at 401. Here, by contrast, the Board reasonably determined that it could not rely on Parker's testimony to conclude that Gulf Coast had in fact stopped complying with the *entire* Agreement. As the Board explained, the line of questioning in response to which Parker made the cited statements only related to Gulf Coast's failure to make payments to the Union and funds and, hence, "in context, [his] testimony [was] directed at [Gulf Coast's] failure to meet its various payment obligations under specific provisions of the [A]greement." (D&O 4 & n.8.) Consequently, that testimony is not dispositive in finding contract repudiation through complete noncompliance. Furthermore, as the Board pointed out, Parker's separate testimony that Gulf Coast also had not used the Union's training programs or hiring hall does not support finding contract repudiation because the Agreement does not contain provisions requiring Gulf Coast to use either one. (D&O 3 n.7; GCX 2, Tr. 66.) [12]

[12] Gulf Coast cites (Br. 12, 22) the testimony of its President Chad Jones in support of its assertion that it had not complied with the Agreement in any way. However, the Board reasonably found that Jones's testimony, like Parker's, was ambiguous because it was made in the context of questions pertaining to Gulf Coast's failure to make contractually required payments. (D&O 4 n.8; Tr. 83-84.)

4. Gulf Coast's other challenges are immaterial because they do not address the Board's rationale

Several of the arguments Gulf Coast raised in its brief are immaterial to the Court's resolution of this case because they challenge theories presented to, but not adopted by, the Board as part of the rationale underlying the Order. Under the Board's Rules and Regulations, "any person aggrieved by a final order of the Board may petition the circuit court of appeals to review and set aside the Board's order." 29 C.F.R. § 101.14. However, it is the Board's order, not the positions of the General Counsel or any other party before the Board, that is before the Court for review. *See Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002) (General Counsel's role is to "defend the decisions of the Board on review, regardless whether the Board adopted the view he expressed as a party before it").

Gulf Coast argues at length (Br. 32-36) that it cannot be collaterally estopped, based on an arbitrator's award, from making its repudiation defense. The Board did not, however, rely on collateral estoppel in rejecting Gulf Coast's argument. (D&O 20.) Likewise, Gulf Coast's various arguments (Br. 16-18, 26) regarding whether its October 2011 letter initially gave clear and unequivocal notice of its repudiation of the Agreement are irrelevant because the Board assumed as much (D&O 2, 3) for purposes of its analysis. And it is not the Board's position that repudiation and termination are synonymous (Br. 13), or that

contract repudiation needs to be lawful or meet contractual termination requirements to be effective (Br. 23-25).[13]

As described above, the Board's position is that Gulf Coast did not give clear and unequivocal notice outside of the Section 10(b) period that it was repudiating the Agreement, regardless of whether the repudiation was lawful. (D&O 3.) As the Board reasonably found, any repudiation message sent by either Gulf Coast's missed fund payments or its October 2011 letter was clouded by the conflicting signals Gulf Coast sent when it moved to compel arbitration under the contract and took a position in arbitration that suggested it would accept the arbitrator's determination regarding the Agreement's contractual validity. Accordingly, substantial evidence supports the Board's finding that Gulf Coast's admitted refusal to provide the Union with relevant, requested information violates Section 8(a)(5) and (1) of the Act.

[13] The Board "assume[d], without deciding, that [Gulf Coast] is correct that a clear and unequivocal mid-term repudiation of its 8(f) agreement with the Union, even if untimely and unlawful, would have excused its [statutory] obligation to comply with the Union's subsequent information request," rather than merely terminating its contractual obligations under the Agreement. (D&O 1.) If this Court determines that Gulf Coast proved that it gave the Union clear and unequivocal notice of repudiation outside of the Section 10(b) period, then the case should be remanded to the Board to decide this underlying issue.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny Gulf Coast's petition for review and enforce the Board's Order in full.

/s/ Kira Dellinger Vol
KIRA DELLINGER VOL
Supervisory Attorney

/s/ Craig R. Ewasiuk
CRAIG R. EWASIUK
Attorney

National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570
(202) 273-0656
(202) 840-7258

PETER B. ROBB
General Counsel

JOHN W. KYLE
Deputy General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

May 2018

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GULF COAST REBAR, INC.	)	
	)	
Petitioner/Cross-Respondent	)	
	)	No. 17-14394-JJ
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	12-CA-149627
	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
IRON WORKERS REGIONAL DISTRICT COUNCIL	)	
	)	
	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 8,336 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 14th day of May, 2018

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GULF COAST REBAR, INC. Petitioner/Cross-Respondent v. NATIONAL LABOR RELATIONS BOARD Respondent/Cross-Petitioner and IRON WORKERS REGIONAL DISTRICT COUNCIL Intervenor	)	No. 17-14394-JJ Board Case No. 12-CA-149627

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

Mary Ruth Houston
Kathleen A. M. Krak
Paul J. Scheck
Shutts & Bowen, LLP
300 S Orange Ave, Suite 1600
Orlando, FL 32801

Michael A. Evans
Hartnett Gladney Hetterman, LLC
4399 Laclede Ave, Suite 200
St Louis, MO 63108

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 14th day of May, 2018